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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-5705

OTIS TRAMMEL, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is officially reported at 583 F.2d 1166. A copy of the opinion appears in the Appendix (A. 39).

JURISDICTION

The judgment of the Court of Appeals affirming the conviction was entered October 11, 1978. The Petition for Writ of Certiorari was docketed on November 13, 1978. Certiorari was granted on February 26, 1979. The jurisdiction of this Court was invoked under

Title 28, United States Code, Section 1254(1) and Rule 19 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V—Capital Crimes: Double Jeopardy: Self-Incrimination: Due Process: Just Compensation For Property

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

65 Stat. 717; Title 18, United States Code, §2. Principals

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

62 Stat. 701; Title 18, United States Code §371. Conspiracy to commit offense or to defraud United States

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

84 Stat. 927; Title 18, United States Code, §6002. Immunity generally

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

84 Stat. 1285; Title 21, United States Code, §952(a).
Importation of controlled substances

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of title II, or any narcotic drug in schedule III, IV, or V of title II, except that—

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 303 [21 USCS §823],

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

88 Stat. 1926; Rule 501 Federal Rules of Evidence, Article 5. Privileges

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

QUESTION PRESENTED

Whether it is reversible error to permit a wife to be called as a witness against her husband over his objection and without his consent.

STATEMENT OF THE CASE

On March 10, 1976, Otis Trammel, Jr. was indicted in the District of Colorado for importation of heroin in violation of Title 21, United States Code, §952(a) and Title 18, United States Code, §2, and for conspiracy to import heroin in violation of Title 18, United States Code, §371 (A. 4-7). Two other individuals were indicted for the same offenses as Trammel, and six persons were named as "unindicted co-conspirators" including Elizabeth Ann Trammel, the petitioner's wife (A. 4-7). A Motion for Severance was filed on behalf of Trammel on May 21, 1976 (A. 8-9). The primary thrust of the Motion for Severance was to point out to the trial judge that counsel had been informed that Mrs. Trammel would be called to testify at trial, and that the petitioner was unwilling to waive the husband-wife privilege where her testimony was concerned (A. 8).

Four days before the beginning of the trial, Trammel's Motion for Severance was heard and denied (A. 10-33). At the hearing, the government framed the issue to be decided in terms of the "competency" of Mrs. Trammel to testify at the trial, and called her as

a witness assuring the court that witness immunity would be granted to her later (A. 10, 11). Elizabeth Trammel testified at the hearing that she and the petitioner had been married in the Philippines on May 31, 1975, and were still married at the time the hearing was being held on June 17, 1976 (A. 11, 20, 21, 26). At the conclusion of that hearing, the trial judge decided that Mrs. Trammel would be allowed to testify against her husband, but that she would not be permitted to testify to any confidential communications between she and the petitioner (A. 27-30, 32, 33).

The trial of this case began on June 21, 1976, and on that day Mrs. Trammel was called as a witness against all of the defendants (A. 34, 35). Trammel interposed an objection to the fact that his wife was being called as a witness noting that she would be testifying without his consent and renewing all of the arguments that had previously been made (A. 34, 35). Once again, the court ruled that Trammel had no privilege to preclude his wife's testimony and overruled the objection (A. 34, 35).

Elizabeth Trammel testified at length about the importation of heroin from the Philippines and Thailand into the United States. She also testified about the petitioner's participation in some of these acts and in an agreement to take part in the unlawful importation of heroin. Except for the testimony of Elizabeth Trammel, however, there was no other evidence presented against Otis Trammel, Jr. from which

a jury could have convicted him of either of the offenses charged. At the conclusion of all the evidence, the jury returned verdicts of guilty on both counts where Trammel is concerned (A-36).

Trammel appealed his conviction to the United States Court of Appeals for the Tenth Circuit. On appeal, the government did not deny either the existence or the validity of the Trammel marriage; but instead argued for the general proposition that where marriage partners are also co-participants in a crime, then the husband-wife privilege should not be available to shield one spouse from the consequences of the criminal transaction. The Court of Appeals basically decided that where one spouse was a participant in a crime with the other, and where the one spouse was granted witness immunity in exchange for testimony, then the "rule of privilege" would not be applied to exclude the testimony of the immunized spouse (A. 39–46). In the majority opinion, the Court of Appeals also suggested that the reason for the husband-wife privilege was not as strong in this case as it might be in some others because of what was perceived to be the lack of a "family life" and proper "home" in the traditional sense (A. 45).

ARGUMENT I

It Was Error To Permit Elizabeth Trammel To Testify Against Her Husband Over His Objection

When this issue was originally raised with the trial court, that court effectively refused to recognize the "testimonial privilege" or "anti-marital facts privilege". Therefore, the trial court decided that there was only one husband-wife privilege, and that the privilege applied to confidential communications between the parties to the marriage during the course of the marriage (A. 27–29, 32, 33). Applying that ruling, the trial judge permitted the petitioner's wife to testify against him, but held that she could not testify to confidential communications. The United States Court of Appeals for the Tenth Circuit abandoned the trial court's position and recognized the "testimonial privilege", but decided that it should not apply where the spouses are both members of the same conspiracy. The Court of Appeals also distinguished the case at bar from the decisions cited by the petitioner by pointing to the fact that Mrs. Trammel had been granted witness immunity to obtain her testimony. As viewed by the Court of Appeals, that additional factor apparently does away with the husband-wife testimonial privilege and certain legal precedent.

We respectfully submit that both the trial court and the Court of Appeals erred in their respective rulings. In *Hawkins* v. *United States,* 358 U.S. 74 (1958), this Court reaffirmed the validity of the tes-

timonial privilege, and specifically rejected the notion that the privilege should be changed to permit one spouse to voluntarily testify against the other. Notwithstanding their recognition of the rule set out in the *Hawkins* decision, the Court of Appeals decided that:

> "Nothing in Hawkins or any other reported decision, to our knowledge, prohibits the voluntary testimony of a spouse who appears as an unindicted co-conspirator under grant of immunity from the Government in return for her testimony." *United States* v. *Trammel*, 583 F.2d 1166, 1168 (10th Cir. 1978).

The grant of witness immunity to Elizabeth Trammel should have no bearing whatever on the husband-wife testimonial privilege. The testimonial privilege relates to both parties and it is only with the consent of both that one may testify. *Wyatt* v. *United States*, 362 U.S. 525, 528 (1960). If it is assumed that witness immunity pursuant to Title 18, U.S.C., §6002 replaces the necessity for consent by the witness-wife as well as replacing her rights under the Fifth Amendment, it certainly cannot effect the need for consent from the other spouse. The Tenth Circuit notes that immunity is ". . . as broad as, but no broader than, the privilege against self-incrimination", but seemingly ignores the fact that the grant of immunity to one spouse is not as broad as the testimonial privilege that was claimed by the other (A. 41). *United States* v. *Doe*, 478 F.2d 194 (1st Cir. 1973), may dispose of

this question where both spouses are granted immunity, but points out that each grant of immunity is limited to the individual witness and no one else.

If the grant of witness immunity is, as we contend, of no real consequence, then the decision of the Court of Appeals in this case is an effort to carve out a new exception to the established principle.[1] The proposed exception centers around the allegation that both marriage partners were involved in an unlawful conspiracy. We do not deny that Rule 501 of the Federal Rules of Evidence, and the opinion in *Hawkins* v. *United States*, *supra*, effectively permit courts to make changes in this privilege where required by "reason and experience", but we deny that either reason or experience supports the exception created in this case. The Court of Appeals recognizes that their decision is directly contrary to certain other circuit court opinions, but prefers to balance the privilege against what the court views as a "more compelling public need".[2] Presumably, the more compelling public need is the need to obtain testimony at any cost, including

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[1] There are three generally recognized exceptions to the principle of testimonial privilege. They include an exception for marriages entered into for fraudulent purposes, *Lutwak* v. *United States*, 344 U.S. 604 (1953); an exception when the crime is committed against one spouse by the other, *Wyatt* v. *United States*, 362 U.S. 525 (1960); and an exception for crimes committed against a child of either spouse by the other, *United States* v. *Allery*, 526 F.2d 1362 (8th Cir. 1975).

[2] *United States* v. *Williams*, 447 F.2d 894 (5th Cir. 1971); *Ivey* v. *United States*, 344 F.2d 770 (5th Cir. 1965) and *Peek* v. *United States*, 321 F.2d 934 (9th Cir. 1963)

the destruction of a family if the prosecutor deems it necessary. This court in *Hawkins* v. *United States, supra,* at p. 78, recognized the probable result of such testimony stating that:

> "Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage."

In addition, experience teaches that it is frequently a simple matter to accuse someone of participating in a conspiracy. Since the agreement that is the basis of a conspiracy can be implied from evidence presented, and since the necessary knowledge and intent may be inferred, it would be easy in many situations to present probable cause for a grand jury to believe that both marriage partners were involved in a conspiracy. Once that is accomplished, the damage would be done because regardless of the ultimate outcome of the conspiracy charged, one spouse could already have been forced to testify against the other.

In addition, the reason for the decision in *United States* v. *Van Drunen,* 501 F.2d 1393 (7th Cir. 1974), which was embraced by the Court of Appeals in the case at bar is not convincing.[3] The implication of the

[3] "Today's holding, combined with Wyatt, limits the privilege to those cases where it makes most sense, namely, where a spouse who is neither a victim nor a participant observes evidence of the other spouse's crime. In that circumstance, the privilege encourages the preservation of a marriage which may conceivably be an important institution contributing to the rehabilitation of the defendant spouse." *United States* v. *Van Drunen,* 501 F.2d 1393, 1397 (7th Cir. 1974).

language quoted from *Van Drunen* is that the courts should encourage only those marriages that may aid the Government in its efforts toward rehabilitation. Such an attitude is diametrically opposed to the spirit of the privilege and the opinion in the *Hawkins* case. In *Hawkins* v. *United States, supra,* at p.p. 78, 79, the court noted that:

> "The limited nature of these exceptions shows there is still a widespread belief, grounded on present conditions, that the law should not force or encourage testimony which might alienate husband and wife or further inflame existing domestic differences."

Regardless of the language in the *Van Drunen* opinion in favor of a co-conspirator exception to the privilege, the case is distinguishable from the case at bar. The distinguishing feature is the fact that in *Van Drunen* the marriage took place after the indictment had been returned, and the testimony that was the subject of the objection concerned matters prior to the marriage.

To support its position, the Tenth Circuit relied in part on *Baker* v. *United States,* 329 F.2d 786 (10th Cir. 1964) and *United States* v. *Pugliese,* 153 F.2d 497 (2nd Cir. 1945). In each case, both husband and wife were charged as co-defendants, and no spouse in either case was actually called as a witness against the other. As Judge McKay notes in his dissent, the *Baker* case was one in which the testimonial privilege was not even claimed. And *United States* v. *Pugliese, supra,* has little to do with the issue here involved, but

instead deals with the admissibility of out of court declarations made by the wife but used against both parties in a joint trial. A similar line of reasoning has recently been used to admit recorded conversations, between the wife and a Government agent, into evidence against both husband and wife in a joint trial. *United States* v. *Price*, 577 F.2d 1356 (9th Cir. 1978). In the *Price* case as in prior cases, the wife was not called as a witness by the Government, and the evidence was being admitted on the theory that the wife was an agent of the criminal venture and her extrajudicial declarations were made in furtherance of that venture. Those situations are easily distinguished from Trammel's case. Elizabeth Trammel was actually testifying against her husband at trial, and not about prior statements made in furtherance of a conspiracy.

Of the more recently reported cases in this area, Trammel's situation is probably closest to the facts of *United States* v. *Lilley*, 581 F.2d 182 (8th Cir. 1978). Although no conspiracy was charged in that case, the parties were obviously jointly involved in the commission of certain crimes. In the *Lilley* case, the Eighth Circuit confirmed the prosecution's position that the husband was unavailable as a witness because of the "antimarital facts privilege", and found that it was reversible error for the trial judge to then allow the husband to be called as a witness in rebuttal.

Finally, the Court of Appeals in the petitioner's case assumes the lack of a marital relationship stating:

> "There was no domestic harmony in the commonly accepted nature of a marital relationship to be preserved following commencement of the criminal activities in August of 1975." *United States* v. *Trammel, supra*, at p. 1170.

There is no evidence whatsoever in the record to support such a conclusion. Regardless of that, however, the mere fact that the condition of a valid marriage is considered, is a dangerous precedent. If permitted to stand, this case could easily encourage trial courts to look behind admittedly valid marriages to determine what chance, if any, the marriage had for survival. In many cases, the evidentiary hearing necessary to make that determination could itself destroy the marriage simply by opening it up to public scrutiny and examination.

In short, the United States Court of Appeals for the Tenth Circuit, in a break with tradition and precedent, decided that a new exception to the husband-wife testimonial privilege is required by reason and experience.[4] We cannot deny that there is at least

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[4] "The overriding benefit to be served in this case has been properly served by the action of the trial court: that of bringing to the bar of justice those who have committed grievous criminal acts which most assuredly have led to the breakdown and destruction of many family units and marital relations involving illicit trafficking and use of dangerous drugs and narcotics." *United States* v. *Trammel, supra*, st p. 1171.

some support for the decision of the Court of Appeals but we contend that the greater weight of authority in this area supports the privilege. Additionally, perhaps the greatest difficulty with this proposed new exception would be its administration. Prosecutors would have virtual control over the privilege because of their ability to bring charges and to petition the courts for witness immunity. We submit that the enforcement of criminal laws has not suffered in the past because of the testimonial privilege and it would not suffer in the future. If the position taken by the Tenth Circuit in this case is upheld, the only institution that will suffer is the family. This was more eloquently stated in the dissent in this case by Judge McKay where he said:

> "While the majority may be upholding important societal values in reaching the result it does, it seems to me that the principle established in this case strikes at one of the few remaining public supports for the institution of the home. And the home is, after all, a more important contributor to law and order than is prosecution. If the homes fail, no number of prosecutors, judges or jails could stem the tide of ensuing crime." *United States* v. *Trammel, supra,* at p. 1173.

Therefore, it is the petitioner's position that the long standing policy of the Federal Courts recognizing the husband-wife testimonial privilege should not be sacrificed merely to support one conviction. On balance, the privilege presently protects both the family and the public at large, and further erosion of the privilege

by the exception suggested in this case would in no way be beneficial.

CONCLUSION

For the reasons stated, petitioner respectfully requests this Honorable Court to reverse the judgment of the Court of Appeals and remand the case with instructions to enter a judgment of acquittal on his behalf.

Respectfully submitted,

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